UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

STATUS CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, November 12, 2014
10:03 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
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Mechanical Steno - Computer-Aided Transcript

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(The Court enters the courtroom at 10:03 a.m.)

THE CLERK: The United States District Court for the District of Massachusetts. Court is in session. Be seated.

For a status conference in the case of the United States versus Dzhokhar Tsarnaev, 13-10200. Will counsel identify yourselves for the record.

MR. WEINREB: Good morning, your Honor. William Weinreb for the United States.

MR. CHAKRAVARTY: As well as Aloke Chakravarty, your Honor.

MS. PELLEGRINI: Good morning, your Honor. Nadine Pellegrini.

MR. MELLIN: Good morning, your Honor. Steve Mellin for the United States as well.

THE COURT: All right.

MS. CLARKE: Judy Clarke, William Fick and Timothy Watkins for Mr. Tsarnaev, whose presence has been waived.

THE COURT: Yes.

There are a couple of pending motions that have been fully briefed relating to discovery and, for lack of a better term, "leaks." I'll give you the opportunity if you want to address those orally as well. As I say, they have been thoroughly briefed, but since we're here, if you want to...

MR. FICK: Thank you, your Honor. I guess I'll start with the discovery motion.

There were nine discrete categories of issues raised in the motion. They were, in fact, rather exhaustively briefed. I'll mention a few of them, I think by way of highlighting and emphasis. One issue that continues to vex us in particular is the issue of the triple homicide in Waltham. And, of course, as the Court is aware, there was the prior round about a year ago concerning that issue where the government invoked the law enforcement privilege. The Court looked at some documents in camera, is our understanding, and denied the motion at that time.

The government now chiefly, I think, responds to the new request by saying, "Well, what's changed?" And several things have changed. The first is that time has passed. We're now on essentially the eve of trial and the weighing that the Court would do in evaluating the application of the law enforcement privilege, the equities, I think, require a new weighing at this point. And, in fact, if there's a legitimate law enforcement reason to continue withholding the information, then, in fact, perhaps we ought to put this issue on hold so there's not a need for a do-over later.

I really can't overemphasize the potential importance of this information, particularly now that the government's position seems to have perhaps even changed on what actually may have happened in Waltham. The disclosure a year ago essentially consisted of the government telling us that Ibragim

Todashev, the young man who was shot in unknown circumstances in Florida, had confessed to committing the murders with Tamerlan Tsarnaev, but they wouldn't provide us with the actual substance of the confession, the privilege was invoked, and it sort of stopped there.

Now the position the government seems to have taken is that, "Well" -- I think the words they use is that "We have no evidence of Tamerlan's participation in the Waltham murders. And that's a very puzzling statement. It's not clear if the government simply means that it may not be in their physical possession and is in the hands of the Middlesex investigators; are they suggesting that the so-called Todashev confession has been disproven? It's really all very much up in the air. But, again, I can't overemphasize the importance potentially of the information. If, indeed, there is evidence that Tamerlan Tsarnaev participated in a brutal triple murder in Waltham, that could be extraordinarily -- would be extraordinarily relevant at a prospective sentencing phase in this case.

One of the tasks of the jury in a sentencing phase would be to evaluate the relative personal characteristics, relative culpability of those involved in these charged crimes. And to the extent there is evidence that Tamerlan Tsarnaev previously committed a brutal triple murder, that would be an important thing for the jury to know and weigh.

The second new wrinkle, I guess you would say, the

government has added in recent months is by providing us with information that there is a witness who potentially would testify that Tamerlan Tsarnaev told our client that he had committed the Waltham murders. That even on the government's earlier arguments about relevance, even the government can see that that would be relevant because it could suggest a kind of influence, coercion, something -- something that might in that sense also be mitigating. But now we're really in a position where it's not clear what the evidence even would show, to the extent it exists. I mean, did Tamerlan Tsarnaev participate; did he not participate? What does the evidence show in either direction? The government's position has changed, although the ubiquitous high-level law enforcement officials don't seem to have changed their tune in the things that are appearing in the media.

So on that particular question I would suggest that if indeed there is a law enforcement reason to continue withholding the information, then this trial ought to be put on hold, and if not, then the equities now weigh in favor of disclosing that information to the defense so that we can make sense of whether and how to use it. Because either way that information is extraordinarily potentially relevant at a sentencing phase in this case.

THE COURT: If you were going to move to the other motion, let's deal with this one and then we'll come back to

the other one.

MR. FICK: To the other segments of this or --

THE COURT: Oh, I'm sorry. Okay. Go ahead.

MR. FICK: Again, I don't want to belabor some of the other points in the papers. I mean, one of the other issues that we had raised, for example, are these documents provided by the government to the defense purportedly sourced from the Russian government. The government here has provided us with essentially disembodied words on a page stripped with all of the attributes that you usually associate with the document: a header, a letterhead, dates, authors. And the government says, "Well, those things aren't relevant. The only thing that's relevant is the context, which we've given you."

But absent the attributes of a document, it limits our ability to investigate the provenance of that, whether we can, in fact, find a witness who is able and willing to testify on these issues. And it also diminishes the weight that these materials might have in front of a jury. I mean, one of the reasons a document is a document and why a document itself is discoverable and not merely disembodied information is because those attributes are things that a jury or that any fact-finder would naturally consider in attributing significance or weight to this. So the government really has offered no reason why they've withheld that information, why they've given this disembodied text and not the document itself.

The third thing I would highlight from the motion are -- is the issue of the government's reports of examination of electronic devices and computers. And here again, we sort of reached a standoff where it's not clear whether we and the government are talking past each other. The government says, "We know our discovery obligations," but the fact remains that the only report of examination of any electronic device of the dozens seized in this case that the government has produced is that 50-odd-page undated so-called ongoing description of certain examination of the defendant's -- the computer associated with the defendant.

If the government is saying that they have not done -- that the FBI has not done anything similar with regard to other devices, well, it's somewhat hard to believe that's the case, but if that is the case, they ought to say it. If, in fact, such materials exist as to the other devices, well, then they ought to be produced because under Rule 16(a)(1)(F) they are reports of examinations and tests, the government itself calls them that, that's what they are, and they were subject to production as they are created.

So with that, I think I will leave the rest to the papers. I don't mean to, you know, attribute less significance to the other issues, but those are the three, I think, that really bear commentary at the moment.

THE COURT: Thank you.

Mr. Weinreb?

MR. WEINREB: Your Honor, I think that there's some misunderstanding on the defense's part about what the government said in its response about the Waltham triple homicide. What the government said is that we have no additional information of Tamerlan Tsarnaev's involvement in that -- or alleged involvement in that homicide other than what has been disclosed previously.

So the government previously disclosed that -- as Mr. Fick correctly says, that Ibragim Todashev claimed to have participated in that homicide and claimed that Tamerlan Tsarnaev participated in it as well. The government has no additional information other than that of Tamerlan Tsarnaev's alleged involvement in that homicide. We have no idea whether Mr. Todashev was telling the truth when he said that he participated in it, and we certainly have no evidence that he was telling the truth when he said that Tamerlan Tsarnaev participated in it.

The Middlesex District Attorney's Office informs us that they are actively investigating that triple homicide, which was a very important case for them, naturally. They are not part of the prosecution team, contrary to what the defense asserts in their motion. The Middlesex District Attorney's Office is not prosecuting this case with the government. What they have in their files is in their files; it is not in our

possession, custody or control.

We also believe that the main argument that we raised in our first response to their request for this information, and that we have continued to maintain over and above any law enforcement privilege, is that the information is entirely irrelevant and would not be admissible at a sentencing hearing. Tamerlan Tsarnaev's possible involvement in another crime unrelated to the crimes that are charged in this case has nothing to do with his relative culpability when it comes to an individualized sentencing hearing for Dzhokhar Tsarnaev, and I'm sure that this particular question will be the issue of briefing down the road.

But it is the government's position that to the extent that relative culpability makes a difference to an individualized decision about a defendant's sentence, it is his relative culpability for the crimes with which he's charged, not his culpability relative to a codefendant who may have committed other crimes at some other time.

We also did not inform the defense at any time that any witness was prepared to testify that Tamerlan Tsarnaev told Dzhokhar Tsarnaev that he had participated in the Waltham triple homicide. What we informed the defense is, as we said in our pleading, that a third party informed the government that there was an individual who had informed this third party that Dzhokhar Tsarnaev had informed the individual or had said

something to the individual about Tamerlan Tsarnaev's involvement in the Waltham triple homicides. We have no idea whether any witness would actually testify that that took place, that conversation took place; we have no idea what the source of Dzhokhar Tsarnaev's belief might have been if, in fact, he actually harbored the belief; if, in fact, he actually said it to this individual. And so that is simply a red herring and there is nothing there.

As for the Russian government evidence, the government produced the information that the Russians produced to the government. The only thing that was redacted from those documents is essentially irrelevant information which would not go to the matters that Mr. Fick claims they would; in other words, the identity of any person who actually obtained the underlying information is not revealed. There's simply nothing in it -- the information that was redacted from the documents is totally peripheral and sheds little if no light on the provenance of the underlying information.

And as for the FTK reports, I do believe the parties are talking past each other because we have litigated this issue twice now about whether simply imaging a computer using a document -- using -- and then examining what's on it using a tool like FTK produces anything discoverable. What the government produced to the defense was something different: It was an analysis of what was on the computer; not simply a

report of the data on it, but an analyst's interpretation of the evidentiary significance of that data which was -- which was prepared at the government's request for potential use at trial. Essentially, the *Jencks* material of an expert witness, or to put it another way, the summary of the testimony of a potential expert witness.

We have no other such reports. If any are produced, we will provide them to the defense when they are produced.

MR. FICK: If I might very briefly, your Honor?

THE COURT: Go ahead.

MR. FICK: On the Waltham issue, first the government suggested that Middlesex is not part of the prosecution team. And that strikes me as an extraordinarily artificial and erroneous distinction given the way events in all of this transpired.

The investigation of Waltham involving Mr. Tsarnaev that led to all of this sort of hubbub began with the marathon bombings. A joint team of Massachusetts state troopers and FBI agents, according to the Florida Attorney General's report, went down and interviewed Mr. Todashev when the supposed confession was made and when Mr. Todashev was killed. So we have joint federal and state involvement at that point from inception.

We also have in this case a second search warrant for Tamerlan Tsarnaev's Honda CR-V that we cited -- a federal

search warrant, approved in federal court, submitted by federal agents, that we cited chapter and verse the supposed probable cause they had to believe Tamerlan Tsarnaev might have been involved in the Waltham murders.

So from the very beginning the investigation of Waltham has been a joint federal-state enterprise that flowed out of the marathon bombing investigation. And so for the government to suggest now that they're taking a see-no-evil, hear-no-evil approach, "We don't want to know what Middlesex knows anymore," I would suggest is an artificial attempt to evade its discovery obligations that are clearly set forth in all of the case law.

The second thing that the government argues is that it would not be relevant. And here I think there likely will be litigation around a potential sentencing phase, but for the government to say the only thing that matters is the relative culpability of two individuals within the four corners of what is charged in this case clearly can't stand up for the case law which says that any potential sentencing phase in terms of mitigation and aggravation, all kinds of factors, both aggravating and mitigating about participants in the crime, can be taken into consideration. So to suggest that Waltham can't be part of that I think is simply not supported in the law.

And the third point the government makes is about the so-called third-party witness. And here again, the Court has

the underlying papers that were submitted under seal. A lawyer for a witness told the government, and the government then disclosed to the defense, that that witness is prepared to say -- or would be prepared to say that Tamerlan Tsarnaev told Dzhokhar Tsarnaev that he participated in the Waltham murders. So, you know, this is not just some kind of eight levels of removed speculative information. A lawyer for a potential witness told something to the government; the government disclosed it to us. That information, even on the government's theory then, makes the Waltham information relevant.

Finally, I'll jump from the computer issue. We are not, in this request -- and the government, I think, is sort of confusing two things. We're not at this point asking for the FTK computer-generated initial forensic report of things that are on a computer. If I could make an analogy, if you take -- if you analogize a computer to a book, what this FTK or other forensic software does is it allows an analyst to go through and essentially insert bookmarks in the book.

We're not asking for that. What we're asking for are narrative reports such as the one they produced for the defendant's computer that describe the examinations and tests that were conducted on the computer and what, if anything, of evidentiary significance was found. A narrative report of examination. The government says there aren't any for any of the other devices? It seems -- given the number of devices

seized, the amount of man-hours put into the case, it seems extraordinarily difficult to believe that that's the case. If it is, I stand flummoxed. But it's really -- given the investigation that's occurred here, it's strange to think that that's true.

MR. WEINREB: I just want to add one thing about the Waltham issue that --

THE COURT: Could you just confirm that that's -- Mr. Fick's understanding is correct, that there are no other narrative --

MR. WEINREB: There are no other analytical reports that were prepared for evidentiary use at trial. We initially litigated, way back in their very first motion to compel, the question of whether a report prepared by the FBI at the request of the prosecutors to explore what evidence we might want to use at trial was producible, whether it was protected by the work-product privilege and so on, and that issue was settled.

Of the reports of the type -- so the motion to compel was a motion to compel reports similar to the one that the government produced most recently in discovery. There were no such other reports.

THE COURT: Okay.

MR. WEINREB: I can confirm that.

And as for Waltham, I just wanted to clarify that. To the extent that there was any joint investigation with the

Middlesex District Attorney's Office of anything, we have treated that as being within our position, custody and control, and have produced what we believe is producible, and anything that's not producible was given to the Court for in camera review.

The federal government obviously has no jurisdiction over a homicide that occurred in Waltham. That's a state matter. And the Middlesex District Attorney's Office has been actively investigating that homicide since it occurred, sometimes more actively than others, depending on what leads they got.

The government's involvement in that -- the federal government's involvement in that investigation was limited essentially to the investigation of Mr. Todashev because he was a close friend of Tamerlan Tsarnaev, the marathon bomber, and it was the federal JTTF that was spearheading the investigation of the bombing.

So to the extent that information was discovered during the bombing investigation, jointly or by the federal government alone, we have treated that as discoverable. To the extent that the Middlesex District Attorney's Office has been conducting its own individual investigation of a state homicide, that is their information. They have not shared it with us, we don't know what's in their files, and we do not view that as a joint investigation.

THE COURT: Okay. Let's move to the next motion.

MS. CLARKE: What we've been calling "the leaks"?

THE COURT: Yes.

MS. CLARKE: Yes. You know, I think maybe we -- we've said "leaks." What we mean is public comments by law enforcement. And now we've brought it to the Court's attention three times. And the government's response this time is a little concerning because they say, "Well, maybe law enforcement read it in the paper and said it to this reporter or maybe they didn't say it," but the point is the reporter for *Newsweek* magazine, a rather reputable magazine, quotes multiple law enforcement sources and a high-ranking law enforcement source close to the investigation of this case. So the information continues to be spoken about by law enforcement contrary to the admonitions of this Court and contrary to the letters that the government has sent.

It seems to me the only way to stop this is for the Court to invite those responsible in law enforcement for implementing the Court's direction and the prosecutor's request into the court and to have a hearing. I don't know how else we bring the -- how important the issue is to the fair trial interest in this case without doing that.

The Court, the last time we were -- maybe not the last time, but in June or July the Court said, "Well, maybe you could follow up to make sure that the letter got directed to

the right people." I don't know if that's happened. That wasn't in the response. But somehow it seems to me that the level of importance to law enforcement needs to be increased by the Court inviting them in for a hearing.

THE COURT: Is your idea that the hearing would simply be a point of emphasis or that it would actually produce some information that would be useful?

MS. CLARKE: It could produce some information that would tell the Court who is not acting in accordance with the Court's direction and the government's orders, and the Court could impose sanctions. There has to be some action taken by the Court. It wouldn't just be a hearing to -- you know, for the sake of a hearing, but so that the Court could uncover who's responsible, what's happening, why this is happening, and take some action.

THE COURT: Mr. Weinreb?

MR. WEINREB: Your Honor, the letter that the government drafted and which the Court saw was sent to the heads of all the major law enforcement organizations involved in the investigation of this matter previously or currently, and we received confirmations from all of them that it had been received and distributed to the people within those agencies.

Our main argument here is not that it's okay for law enforcement agents not involved in this case to be commenting on it, certainly not that it's okay for law enforcement agents

involved in it to be commenting on it. We wish that all law enforcement agents would keep their counsel and not talk to reporters about the case at all. But this is a high-profile case, and there are always going to be people who are interested in talking to reporters.

Our main point here is that there is nothing in these articles, in these disclosures, that points in any direction that would provide a fruitful avenue for inquiry. There's no claim, for example, that a high-ranking FBI official provided this information or something that would actually suggest that a law enforcement officer who is actually participating in this investigation is somebody who commented to law enforcement. It could be any law enforcement officer anywhere.

These comments are essentially being made about material that is not -- information that is public or easy to surmise, and presumably it enhances the authoritativeness of the information in the article to be able to say that a high-ranking law enforcement official has confirmed or has said the thing that is being reported. But in these cases the thing that is being reported is public knowledge. It's either been made public by the individuals themselves, by their attorneys, or by other reporters who were speculating about it.

We simply see no reason to assume, based on anything that has been written here, that anybody who is actually charged with some ethical obligation not to talk to the press

about this particular case has violated it. And even if there were some indication of that, there's no clue given in any of these articles as to who it might be or even where to begin looking.

And so a hearing on the matter at which the heads of agencies were brought in here and questioned by the defense would serve nothing but to be a distraction.

THE COURT: Okay. I'll reserve on both motions.

I believe, according to a schedule that was previously established, the government was to serve responsive expert discovery at the beginning of this month. If that was done, could I have a copy of it under seal?

MR. WEINREB: Yes, your Honor, but there was none.

THE COURT: There was none?

MR. WEINREB: No.

THE COURT: Okay. So I can't get a copy of it under seal.

MR. WEINREB: To the extent --

THE COURT: So in other words, there was original disclosure, affirmative by the government, there was then affirmative disclosure by the defense, both of which I have seen, and no responsive government's service of materials with respect to the defense disclosures. Is that accurate?

MR. WEINREB: With respect to the liability phase disclosures, yes. There will be presumably -- and we will

provide that under seal at the time.

THE COURT: Correct. Correct. Which is yet unscheduled?

MR. WEINREB: No, it's been scheduled, your Honor, but it's in the future.

THE COURT: Response to?

MR. WEINREB: The defense affirmative penalty-phase expert disclosures have not yet been made.

THE COURT: Are they scheduled?

MR. WEINREB: They are.

THE COURT: I just am forgetting that.

MR. WEINREB: They are.

MS. CLARKE: One has been made, and the new date, once the dates got rearranged, is November the 24th, I believe.

MR. WEINREB: That's true.

THE COURT: Okay. All right.

MR. WEINREB: Yes. And to the extent that there is responsive discovery, there's a date for the responsive --

MR. FICK: We'll provide that.

THE COURT: Fine. Okay.

I think the next issue is a date for the disclosure of defense witness list and exhibits as to which there is some controversy. The government's dates are the 15th and 29th of December for a preliminary and final, and there is not agreement, which we had hoped there might be. And I don't know

if you want to address that, but we should deal with that as well.

Ms. Clarke.

MS. CLARKE: Well, your Honor, as the Court knows, we're scrambling, and we've made that clear in our motion for continuance and in discussions with the Court.

We have suggested that our defense exhibits could be -- the exhibit list could be provided January 30th. We're predicting that that's about the time that the government's guilt phase would begin. You know, it depends on how long jury selection takes.

With regard to witness lists, we've made our points clear in our pleading. We don't want to do it. We had some discussions with the government about a protected way to provide names of witnesses, which the government ultimately did not follow through on discussing with us. We don't believe that the rules envision it or require it, and to talk about a tactical advantage that Mr. Tsarnaev is trying to get is to ignore what the rules actually say.

Congress rejected the idea of production of witness lists. A lot of courts came up with, you know, the community sort of deciding that there should be a mutual exchange. But in capital cases there is no mutuality; the statute requires the government to produce a witness list and not the defense.

In a case other than this, I think that we might be in

a slightly different position to discuss the witness list, but here we're already struggling with getting people to actually talk with us, and to have the names revealed to the government and the follow-up interviews or re-interviews, which there probably would be, we think we would then lose whatever potential witnesses we may have anyway.

So this is a very serious issue to us and one with which we are not playing games or seeking any unfair advantage that the rules do not envision. We are seeking to stand behind the rules and resist the production of a witness list.

We've offered to the Court and to the government a way in which the Court could at least let prospective jurors know about names so that there could be some voir dire. I'm doubting that jurors will know the names. But we are really worried about losing the slim list of real potential witnesses that we really would like to have. So we resist that, and we ask the Court not to order it.

And with regard to the exhibit list, in the eternal hope that we'll have something actually to provide, we've asked for January 30th. If we have to provide an exhibit list in mid December, we probably simply won't have anything to put on it. And we have talked to the government about trying to provide them with something that's more real than not real.

Our Rule 16 disclosures are set for, I think, the 24th of November. Our list of mitigating factors are set for the

middle of December. So to the extent the government is curious or concerned, they should be getting some information that, you know, may or may not be helpful to them in their prep.

MR. WEINREB: I just want to emphasize two points, your Honor. The first is the defense does not assert nor can they assert any legal right of theirs would be implicated by the Court ordering the production and exchange of witness lists. I'd simply say the Court lacks authority to do it. But the local rules plainly provide the Court authority to do it. In fact, that's the presumption, is that the parties will exchange witness lists.

There is a provision for either side to object, but the Court is given the power to hear argument and rule on those objections. So clearly the Court is given the authority to order the exchange of witness lists.

The reasons for exchanging witness lists in advance of trial is obvious. It gives both sides an opportunity to prepare, to cross-examine the other side's witnesses and, therefore, give the jury what it's supposed to get, which is an adversarial presentation of information. The jury is supposed to be in a position to try and understand, to evaluate the testimonial capacities of the witnesses, any biases they might have, whether they're telling the truth or lying. The government is simply not going to be in a position to prepare to give that helpful information to the jury if we don't know

who the witnesses are until they're called to the stand, or even the day before.

THE COURT: Go ahead. Maybe you were going to address this, but let me ask the question: For this point of scheduling, do you distinguish between witness lists and exhibit lists?

MR. WEINREB: Well, the exhibit lists -- we do distinguish between them. If I may just finish with the witnesses, the only other point I wanted to make is that the defense has said that they do not want to produce a witness list because they don't want the government to talk to any of the potential defense witnesses before they testify. And that simply is contrary to the system that we have in place. Witnesses are not supposed to belong to either party; they are supposed to be witnesses for the jury and they are supposed to be accessible to both sides. And the defense, by simply withholding who their witnesses are until the last possible moment, is trying to undermine that principle and prevent -- effectively prevent the government from talking to potential witnesses.

With respect to the exhibit list, the dates that we have proposed -- we accept that the defense's exhibit list may grow over time. And we don't have any problem with that. We would simply like to have on December 15th and 29th, or whatever the exact dates were, the exhibits that the defense at

that point knows that they -- or reasonably intend to introduce. We have no problem with the defense supplementing its exhibit list as time goes on provided there's sufficient information for the government to review whatever the potential exhibits are, object to them if we have any objections, and file motions in limine and have the Court have time to decide them.

And I think that's the way it's normally done in most cases, which is that both sides frequently supplement their exhibit list as time goes on in good faith, meaning that these are not exhibits they knew from the start they were going to introduce but things that it became apparent during the course of the trial would be useful. Maybe they weren't thought about before or maybe something happened in the trial that made them useful when before they wouldn't have been useful. And we have no problem with that for either side, provided that reasonable notice is given to the other side to permit, you know, reasonable opportunities by both parties and the Court to rule on the admissibility of the exhibits.

THE COURT: And to be clear, we're talking about affirmative use of exhibits, right? It's not impeachment use?

MR. WEINREB: That's correct.

THE COURT: Okay. What about a separate schedule for a guilt phase and penalty phase?

MR. WEINREB: Yeah, I think that makes sense. In

fact, initially the defense had proposed -- when we were discussing this had proposed a date for penalty phase motions in limine. And I -- we were concerned that the date might turn out to seem arbitrary in the end because we don't know when the penalty phase, if there is one, will begin.

So we don't have a problem with a set of dates for the production of penalty phase exhibits and for motions in limine respecting those exhibits and so on when the date that -- of the beginning of the penalty phase becomes clear.

THE COURT: So I take it you're content in your present request for exhibit lists pertaining to the first phase of the trial?

MR. WEINREB: Yes. With this caveat, which is I would say to the extent we know what exhibits we will be introducing in the penalty phase, we would propose to disclose them at the same time as we disclose the liability-phase exhibits, because the phases will proceed somewhat seamlessly, and we would ask that the defense be ordered to do the same. They may already -- presumably are formulating their penalty-phase presentation, if one is going to be required by them, and they may have exhibits that they've identified. And there's no reason why the parties shouldn't exchange those before trial gets underway and, you know, the parties get distracted by the need to be preparing witnesses and other things and don't have as much time to draft motions in limine and so forth.

So, you know, I think if the Court simply orders that the parties produce the exhibits that they reasonably intend to introduce in both phases on the 29th with the understanding that that can be, in good faith, supplemented seasonably with sufficient notice to the other side, I think that would be the ideal arrangement.

THE COURT: Ms. Clarke, anything else?

MS. CLARKE: No.

THE COURT: Well, okay. First of all, I don't have any doubt of the Court's authority to set a date for disclosure by the defense. And I think for the proper conduct of jury selection, it's necessary for the disclosure to precede that as to the witnesses, not necessarily to the exhibits. So I think by the 29th -- December 29th the defense should disclose its expected witnesses for both phases of the case.

With respect to exhibits, I think a simultaneous disclosure of those exhibits the defense expects to use in its first phase of the case -- and we can postpone the identification of exhibits relative to a penalty-phase. I suspect there will be a significant difference in the volume as to the first and the second, although, of course, some -- perhaps the government already -- to the extent there will be any expert testimony offered in a guilt phase that might rebut or counter government expert witness, that is something that could be anticipated and disclosed. It probably already has

been.

Okay. Let me just give you a general outline of what I think the trial procedure will be once we get started. I think once the case begins, it's important that we move efficiently and productively, so my idea is that we will sit full days rather than nine-to-one days but four days a week to give some relief to the jurors primarily, and to some extent the trial teams who can use probably the day to do something. I'll find some other things to do on that day myself.

So my thought is we will try Monday through Thursday on a nine-to-four schedule, and I reserve the right to make that a longer day if it seems feasible and prudent, but right now, we'll presume it's nine to four with Fridays not a trial day.

There are a couple of anticipated Monday holidays in the time frame we're talking about. In those days we'll use the four non-holiday days. We won't -- so we'll use a Friday in that case. So one would be Martin Luther King Day; one would be Presidents' Day. We would treat that holiday as the day off for everybody.

So now let's turn to additional scheduling of matters relating to pretrial motions. I think your proposal in the status report that was filed was December 5th. This is whatever in limine motions the parties may have in mind, including *Daubert* motions. December 5th with responses by the

19th, and then you suggested replies by the 29th. I would really like to shorten the reply time to the 23rd. I don't know how -- what the volume of motions is going to be, but on our side we'll need some time to absorb them. And I think I would like to have them earlier than the 29th, which -- both the weeks are shortened weeks because of holidays, obviously, but I think -- so we have fewer business days anyway. But I think to the extent these are replies, then a true reply should be feasible on a shortened schedule. So I would just amend the proposed schedule to the 5th, 19th and 23rd for pretrial motions -- for motions, oppositions, replies.

Now, with respect to both proposed jury questionnaires and proposed preliminary instructions to the jury, again, I'm thinking that we'll need to move it along a little bit faster than the parties have suggested. And I would like both the -- well, let's -- I guess we could hope that the parties might be able to provide joint submissions on that, but let's provide for the occasion that they don't. Both as to the instructions and as to the proposed questionnaire, I'd like to have them filed by December 1st and replies by December 8th, a week later. There's going to be a lot of work to be done on those. I anticipate that there will be broad areas of agreement; I anticipate there will be areas of disagreement. And even where there are areas of agreement, I may have my own ideas. So we'll need some time to work through those.

And I want -- the reason I'm selecting the 8th -- I know you have a later date, the 15th, suggested. I don't want it that close to the pretrial conference. I want some time to absorb all that before we have the pretrial conference. And that is scheduled for the 18th, and we'll proceed.

I want to confirm the jury process starting on the 5th. We've had a little internal rearranging of cases. Some of my colleagues have accommodated us by moving cases they had scheduled for the 5th so that we can monopolize the jury pool. And we'll begin -- we'll -- I think the outline is -- we're going to be fine-tuning some of this -- but we expect the procedure that I think you had both discussed before, bringing in lots of 200, having the questionnaires filled out. Right now we anticipate three days of that, which would give us 1,200 questionnaires.

I'm not sure exactly what after that. We'll -- I want to think a little bit more about that. I know you've asked for some time to absorb the questionnaires, and I think that judgment may best be made after we know what the questionnaire looks like. We may do some fine-tuning on that. It has to be practical, obviously. We'll do what we have to do.

So I think that's pretty much my agenda. Is there anything else?

MR. WEINREB: Your Honor, just a couple of things with respect to that schedule. The government has taken to heart

the Court's admonition a long time ago not to try -- to try and not to over-prepare this case, that to keep in mind that not everything that could be put into evidence should be and to streamline things as much as possible.

THE COURT: I'm glad you remember that.

MR. WEINREB: Yes.

Having said all of that, the government, at least, would like to make our pitch for doing nine-to-one days, as is common, with the understanding that it could be changed at any time to longer days if it seemed as if things were not moving expeditiously. And the reason is partly that we anticipate, given the unusual nature of the case, that there may be more litigation going on during the trial than normal, and there's going to need to be time to brief and address these issues and have the Court decide them, but also logistical issues. That we're going to be bringing in a lot of people from out of town. And it's not practical for us to bring a lot of people in twice, try to prepare them, have them go back, bring them back in. So that we were really anticipating using the afternoons and the evenings to get witnesses ready for the next day, so that they can come in, get prepared, testify and leave.

So it's obvious the Court's put a lot of thought into this, and I won't belabor it, but our only suggestion would be let's give it a try, at least at the start. If things seem to be moving along quickly, then all to the good; if not, then we

understand it could change.

Secondly, the Court didn't mention anything about school vacation week --

THE COURT: We will try through school vacation weeks.

MR. WEINREB: We will? Okay.

With respect to --

THE COURT: I guess I'm assuming that people who have a serious school vacation issue will not be seated. That's what typically happens in cases.

MR. WEINREB: Okay.

(Government counsel confer off the record.)

MR. WEINREB: Just two other quick things. There had been some discussion -- or the Court had mentioned at an earlier point if a hearing were necessary on the motion-to-suppress statements on the voluntariness, that it would be done in the afternoons. And there may not be afternoons, so just to put on the Court's radar --

THE COURT: I don't think I said "afternoons"; I think I said we'd deal with it.

MR. WEINREB: Very well. In any event, that *Daubert* hearings and so on that might otherwise have been done in the afternoons, just think about scheduling those.

THE COURT: All right.

MR. WEINREB: And does the Court want to schedule a status hearing to discuss the jury questionnaires at this point

or should we --

THE COURT: I don't want to schedule it now. I think there are some matters like that that we will have to schedule but --

MR. WEINREB: So we'll be back before the pretrial conference?

THE COURT: Probably, yes.

MR. WEINREB: Very well.

THE COURT: Let me say on -- well, go ahead.

MS. CLARKE: No, you first.

THE COURT: On the schedule: I mean, I have thought about various combinations of configurations of the trial day, and I think I'll just put the presumption in the other direction. We'll start on a full day. If it becomes a problem, we can adjust. If there's a substantial motion that needs some evidentiary attention, we can just make an exception, and that Wednesday afternoon we won't sit with the jury; we'll take up something else.

So I think we can do it, but I would like to -- I think it's important. It's going to be a long trial under any circumstances, and I think lengthening the trial day will hopefully have some effect on shortening the overall length of the trial. So we'll at least start that way. If it turns out to be a disaster, we can readjust.

MR. WEINREB: The only other request is that if there

is no interim hearing between now and the 18th, we would renew our request that the defendant be brought in on the 18th just to ensure that --

THE COURT: I believe it was indicated at the last status conference that he would be. I expect that he would be. It is common practice in this court for defendants not to be physically personally present at status conferences, but of course they would be expected to be present at a final pretrial conference. So I expect that will be the case, and I think that was what Ms. Clarke indicated, or Mr. Bruck, last time.

MS. CLARKE: Yes. Absolutely. And, you know, lest anyone get confused or concerned that the government make a request that Mr. Tsarnaev be here, that seems to get everybody excited, that there's been something wrong or improper about his lack of presence. And I thank the Court for its comments. We've just been following local practice.

THE COURT: Right.

MS. CLARKE: Could I just ask for a clarification of a couple of things, your Honor? On the jury questionnaire, then, I understand that the parties should submit them on the 1st?

THE COURT: Correct.

MS. CLARKE: Not on the 8th?

THE COURT: Correct.

MS. CLARKE: Okay. Then in limine, the Court indicated that there would be in limine motions on the 5th. I

think the parties envisioned trial briefs and guilt-phase in limine motions on the 29th and responses on the 5th. We were envisioning *Daubert* and any other pretrial motions, whatever they might be, on the 5th.

MR. WEINREB: Your Honor, we join in that. The parties obviously need to see each other's exhibit lists before -- and potential witness lists --

THE COURT: Yes. Okay. Right. Perhaps I misspoke in including in limine motions. I was referring to the schedule you proposed. And the only date I was adjusting in that -- well, adjusting the date with respect to the jury questionnaire and preliminary instructions, that section. With respect to trial briefs and those motions in limine, the dates you suggest are fine.

MS. CLARKE: Thank you, your Honor.

THE COURT: But *Daubert* or other anticipatable pretrial motions that aren't dependent on the disclosures by December 5th.

MS. CLARKE: Thank you.

THE COURT: Okay.

MS. CLARKE: Thank you, your Honor.

THE COURT: Thank you all.

MR. WEINREB? Thank you.

MR. CHAKRAVARTY: Thank you, your Honor.

THE CLERK: All rise for the Court.

(The Court exits the courtroom at 10:54 a.m.)

THE CLERK: Court will be in recess.

(The proceedings adjourned at 10:54 a.m.)

C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSO, RMR, CRR
Official Court Reporter

Date: 11/24/14